119 561

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 90.

THE NORTHERN PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

MARK PAINE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED OCTOBER 6, 1883.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Mark Paine, plaintiff, and The Northern Pacific Railroad Company, defendant, a manifest error hath happened, to the great damage of the said defendant, as is said, we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this fifth day of March, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the one hundred and seventh year.

[Seal U. S. Circuit Court, Dist. of Minnesota.]

H. E. MANN,
Clerk of the Circuit Court of the United States of America for the District of Minnesota.
By O. J. REYNOLDS,
Deputy Clerk.

2 UNITED STATES OF AMERICA, } *ss.*
District of Minnesota, }

The answer of the judges of the circuit court of the United States for the district of Minnesota, in the eighth circuit, in within writ mentioned.

The record and proceedings whereof mention is within made, with all things concerning the same, are hereby respectfully certified to the justices of the Supreme Court of the United States of America, within mentioned, in a certain schedule to this writ annexed, marked "Schedule A," as within it is commanded.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Saint Paul, in the district of Minnesota, this 12th day of April, in the year of our Lord one

thousand eight hundred and eighty-three, and of the Independence of the United States the one hundred and seventh year.

[Seal U. S. Circuit Court, Dist. of Minnesota.]

H. E. MANN,
Clerk U. S. Circuit Court, Dist. of Minnesota.
By O. J. REYNOLDS,
Deputy Clerk.

2½ SCHEDULE "A."

3 *Bond on Writ of Error.*

In the Circuit Court of the United States for the District of Minnesota.

MARK PAINE, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Know all men by these presents that we, W. P. Clough, for anon behalf of the Northern Pacific Railroad Company, as principal, and H. Brandenburg and C. A. Moore, as sureties, are held and firmly bound unto Mark Paine, plaintiff above named, in the full and just sum of fifteen thousand dollars (15,000), to be paid to the said Paine, his executors, administrators, or assigns; to which payment, well and truly to be made, we hereby bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 24th day of February, A. D. 1883.

Whereas lately in a suit depending in the circuit court of the United States for the district of Minnesota, between Mark Paine, plaintiff above named, and Northern Pacific Railroad Com-
4 pany, defendant above named, a judgment was rendered against the said defendant, the Northern Pacific Railroad Company, and the said defendant having obtained a writ of error, and filed a copy thereof in the office of the clerk of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the aforesaid Mark Paine, citing and admonishing him to be and appear at a Supreme Court of the United States to be held at Washington on the second Monday of October next:

Now, therefore, the condition of the above obligation is such that if the said Northern Pacific Railroad Company shall prosecute the said writ of error to effect, and shall answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

W. P. CLOUGH. [SEAL.]
HENRY BRANDENBURG. [SEAL.]
CHAS. A. MOORE. [SEAL.]

Sealed and delivered in presence of—
WM. ELY BRAMHALL.
OSCAR L. TAYLOR.

5 STATE OF MINNESOTA, } ss:
Ramsey County, }

Personally came before the undersigned, a notary public in and for the county and State aforesaid, W. P. Clough, H. Brandenburg, and C. A. Moore, who, having been by me first duly sworn, did depose and say, each for himself, that he is worth the sum of fifteen thousand dollars ($15,000) above debts and liabilities of property exempt under levy of sale and execution.

W. P. CLOUGH,
HENRY BRANDENBURG.
CHAS. A. MOORE.

Subscribed and sworn to before me Feb'y 26, 1883.
[NOTARIAL SEAL.] WM. ELY BRAMHALL,
Notary Public, Ramsey Co., Minn.

(Endorsed:) I hereby approve the bond and grant writ of error. R. R. Nelson, judge. Filed March 5, 1883. H. E. Mann, clerk, by O. J. Reynolds, deputy.

6 *Summons.*

STATE OF MINNESOTA, *County of St. Louis:*

District Court, Eleventh Judicial District.

MARK PAINE, Plaintiff,
against
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

The State of Minnesota to the above-named defendant:

You are hereby summoned and required to answer the complaint in this action which has been filed with the clerk of said court in and for said county of St. Louis, and to serve a copy of your answer to the said complaint on the subscribers at their office in the village of Duluth, in said county, within twenty days after the service of this summons upon you, exclusive of the day of such service, and if you fail to answer the said complaint within the time aforesaid the plaintiff in this action will, upon such failure, have the amount he is entitled to recover ascertained by the court or under its direction and take judgment for the amount so ascertained.

Dated May 18, 1881.

ENSIGN & CASH,
Plaintiff's Attorneys, Duluth, Minn.

7 (Endorsed.)

STATE OF MINNESOTA, } ss:
County of St. Louis, }

I do hereby certify & return that at the village of Duluth, St. Louis county, Minnesota, on the 19th day of May, 1881, I served the within summons on the within-named Northern Pacific Railroad

Company by handing to and leaving with A. S. Chase, acting freight agent of the said Northern Pacific Railroad Company, within said county of St. Louis, Minnesota, a true and correct copy of said summons.

S. C. McQUADE,
Sheriff St. Louis Co., Minn.,
By HENRY A. SMITH, *Deputy.*

Filed May 20, 1881. J. R. CAREY, *Clerk.*

8 THE STATE OF MINNESOTA, *County of St. Louis:*

District Court, 11th Judicial District.

MARK PAINE, Plaintiff,
against
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Mark Paine, the above named plaintiff, complaining of the said defendant, The Northern Pacific Railroad Company, alleges the following facts, which constitute his cause of action:

I.

That on the 9th day of October, 1880, the said defendant was, ever since has been, and still is, a corporation created, organized, and existing under and by virtue of an act of the Congress of the United Stated entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound," approved July 2, 1864.

II.

That prior to and upon the 9th day of April, 1881, this plaintiff was, and now is, the owner and entitled to the immediate possession of six thousand one hundred and eighty (6,180) pine saw-logs, containing 1,740,746 feet of lumber, lying and being in and
9 upon the banks of the St. Louis river, in sections fifteen (15) and twenty-one (21), in township fifty-five (55) north, of range nineteen (19) west, in the county and State aforesaid, all of which said logs were marked upon the bark thereof thus "+ +" (two crosses), and on the ends thereof thus "" (five diamonds), and were of the value of ten thousand four hundred and forty-two and $\frac{85}{100}$ dollars ($10,442.85).

III.

That on or about the 9th day of April, 1881, said defendant, at the county of St. Louis aforesaid, unlawfully and wrongfully took possession of said logs, and still unlawfully and wrongfully retains the possession thereof, although the same have been demanded by this plaintiff, and the said defendant has wrongfully and unlawfully converted the said saw-logs and all of the same to its own use,

to the damage of this plaintiff in the sum of ten thousand four hundred and forty-two & $\frac{85}{100}$ dollars.

Wherefore the plaintiff demands judgment against the said
10 The Northern Pacific Railroad Company for the sum of $10,442.85, with interest thereon from the said 9th day of April, 1881, besides his costs and disbursements in this action.

ENSIGN & CASH,
Atty's for Pl'ff.

STATE OF MINNESOTA, } ss:
County of St. Louis, }

Daniel G. Cash came before me personally, and, being duly sworn, doth say that he is one of the plaintiff's attorneys in the above-entitled action; that the foregoing complaint is true, to the best of his knowledge, information, and belief, and that the reason why this verification is not made by said plaintiff is that he is absent from the county of St. Louis, Minnesota, where resides this affiant, his attorney.

DANIEL G. CASH.

Subscribed and sworn to before me on this 18th day of May, A. D. 1881.

[NOTARIAL SEAL.] J. D. ENSIGN,
Notary Public.

(Endorsed:) Filed May 18, 1881. J. R. Carey, clerk.

11 STATE OF MINNESOTA, } ss:
County of St. Louis, }

I, J. R. Carey, clerk of the district court, 11th judicial district, within an- for said county, the same being a court of record, do hereby certify that I have carefully and diligently compared the foregoing copies of the summons, certificate of service, and endorsements thereon and complaint in an action wherein Mark Paine is plaintiff and the Northern Pacific Railroad Company defendant, and that the same are true and correct copies thereof and therefrom, the originals of which are now on file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Duluth, on this 4th day of November, A. D. 1881.

[SEAL OF COURT.] J. R. CAREY, *Clerk.*

12 *Reply.*

STATE OF MINNESOTA, *County of St. Louis:*

District Court, 11th Judicial District.

MARK PAINE, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

The plaintiff, for reply to the answer of the defendant herein, denies that he has any knowledge or information sufficient to form a

belief as to the time when said defendant employed James B. Power and Charles F. Kindred to act as its agent in the care, management, or sale of its lands, or when they or either of them entered into the service of said defendant, or how long they or either of them continued in its said service, or whether they or either of them were dismissed by said defendant from such service, or, if dismissed, when they were so dismissed.

And the plaintiff further denies that he has any knowledge or information sufficient to form a belief as to the duties of such
13 agents in regard to the negotiation of sales of the lands of said company further than as hereinafter set forth, or in regard to the system adopted by said defendant for the appraisal of its said lands, nor when such system came in force, nor how long the same continued, nor as to the instructions or authority said defendant gave to its said agents, nor of any understanding, arrangement, or agreement subsisting between defendant's said agents and itself.

But said plaintiff avers that for several years the said Power has been held out to the public by the defendant as its general land agent, duly authorized to make contracts for the sale of and to sell its said lands, and that his said acts as such have always been ratified and confirmed by the defendant.

And the said plaintiff further avers that said Kindred was a clerk and assistant for said Power in the transactions of caring for, managing, and selling said lands.

And, further replying, the plaintiff denies that in accordance
14 with a system adopted by defendant it was the duty of said Power and Kindred, during the time of their employment as as aforesaid, to sell such of the defendant's lands as might be valuable for the timber standing or growing thereon, only in small lots and to actual settlers, and at prices based upon the quantity of timber standing upon the land in addition to the price of the land itself, and alleges that such lands have been sold in large blocks or quantities to persons other than actual settlers, and at the same and a less price per acre than those sold to plaintiff, and that such sales were well known to and uniformly ratified by the defendant.

And, further relying, the plaintiff admits that during the employment of said Power and Kindred by defendant, and prior to the purchase of the lands described in said answer, he has purchased other lands of said company, but he alleges that he always purchased such lands at the fair average rates at which similar lands were being sold by said defendant and at rates established by said defendant for such lands.

And plaintiff denies that he has engaged with said Power and Kindred or either of them in speculative operation or opera-
15 tions of any kind with lands acquired from the defendant, during the period aforesaid or at any other time, and he denies that he ever acquired any lands from the defendant in connection with said Power and Kindred or either of them, and denies that he has had in any purchase from defendant the assistance of said Power and Kindred or either of them other than as they may have

acted in performance of their ordinary duties as the agents of said defendant.

And, for further reply, the plaintiff denies that he has any knowledge or information sufficient to form a belief as to whether during all or any of the period of the employment of said Power and Kindred large numbers of shares of the defendant's capital stock were outstanding or whether the same was known and designated as the defendant's preferred stock, but the plaintiff is informed and believes that the defendant, in or about the year 1872, became insolvent from the improvidence, inefficiency, and dishonesty of its management; that it had negotiated over thirty millions of
16 its first-mortgage bonds and only built five hundred miles of railroad; that in order to compromise with its said bondholding creditors, and to prevent the property of said corporation from passing out of the control of its stockholders, the defendant made an arrangement with said bondholders by which they accepted certain preferred stock of said company in lieu of their said bonds, which stock was privileged to be used at par in the purchase of their lands and really represented and still represents the indebtedness of the defendant.

The plaintiff admits that at or about the time of the purchase of the lands described in the answer the bonds or preferred stock of the company was selling [at] 60 or 65 per centum of its par value, but he avers that the same was so selling below its par value only because the prices asked for defendant's lands were too high and above their real value.

And this plaintiff denies that he ever in any manner whatever conspired with the said Power and Kindred, or either of them, to deprive the defendant of the full or any benefit of its lands, or the sale thereof, or for any purpose whatever, and he denies that
16½ he ever fraudulently obtained the title to any of the lands of the defendant.

And the plaintiff admits that he purchased of the defendant the lands described in the answer herein.

And plaintiff denies each and every charge of fraud, conspiracy, wrong, or unfairness connected with the purchase of said lands, as alleged in said answer or otherwise.

And said plaintiff avers that on or about the 9th day of October, 1880, this plaintiff made an offer to defendant, in the ordinary course of business and in the manner in which offers are and then were made to said defendant, to purchase said lands at and for the price of $2.50 per acre, such being the common and customary price at which lands were being sold; that said offer was accepted, and thereafter this plaintiff purchased of the Security Bank of Minneapolis the requisite amount of bonds or preferred stock of defendant company to pay for said land, at the price mentioned, and paid the same to the general agent of said defendant, and received
17 from said defendant a contract for the conveyance of said land; that said contract bears date, to wit, October 9th, 1880; that a deed of conveyance was drawn by said company to the plaintiff bearing the same date, and forwarded to the general office of the

defendant, in the city of New York, according to the common custom of making sales and conveyances by said defendant, and the same was duly executed by said defendant on or about Dec. 1st, 1880, and shortly thereafter was delivered to this plaintiff.

And the plaintiff says that he made no representations whatever at the time he purchased said lands, or at any other time, as to its character or quality, knowing that the defendant professes to have all its lands examined and to have accurate information and descriptions of the same and full knowledge as to their value.

And this plaintiff denies that the said lands were or are worth the sum of $30,000, or any other sum exceeding the sum of $5,000; and he denies that said land was covered with a dense growth of pine timber, and avers that the pine upon said lands was in
18 scattering groves, and that much of the lands was swampy, and that this plaintiff at the time of such purchase did not well know the character of said land, and felt that he was running much risk in making said purchase; and he denies that the said lands were at the time of such purchase, or at any time since said purchase, or are now, worth ten times the sum named in said contract or any other sum exceeding the amount hereinbefore stated.

And the plaintiff denies that said Power or Kindred, or either of them, had or were to have, or have or are to have, any interest whatever in said lands, or any part thereof, or in the proceeds thereof, or in the preferred stock purchased by plaintiff as aforesaid to pay for said lands. And plaintiff affirms that he made such purchase solely for himself and for his own use and benefit, and that he paid a fair compensation therefor.

And the plaintiff alleges that he purchased the bonds or preferred stock of said defendant to make the payment for said lands
19 from the Security Bank of Minneapolis, and paid therefor the regular market price, and he denies that he purchased the same or any part thereof for or on behalf of or in connection with the said Power and Kindred or either of them, or that they or either of them had or were to have any right or interest in or to the same; and he denies that they or either of them were consulted in regard to or had any knowledge from this plaintiff of such purchase of said bonds or stock, and he further says that he paid said stock to said Kindred as the agent as aforesaid of said defendant in the ordinary course of business.

And he denies that he has any knowledge or information sufficient to form a belief as to what became of said bonds or preferred stock after he paid the same to the defendant's agent and received the contract for said lands; and he denies that he ever instigated said Power and Kindred or either of them to make any representations of any kind to said defendant in regard to said purchase, and he denies that he knows or ever knew of any represen-
20 tations being made by them or either of them to said defendant; and he denies that he ever requested said Power and Kindred, or either of them, to misrepresent any fact or facts in regard to said purchase or in regard to the character or quality of said land, or requested or instigated said Power and Kindred, or

either of them, to conceal any fact or thing in regard to said purchase of said land from said defendant; and he denies that there was anything in regard to said purchase, from its inception to its conclusion, that he desired to conceal from said defendant in any way or manner whatever; and he alleges that said purchase was made from said defendant in perfect good faith, and without any misrepresentation, concealments, or other wrong upon the part of this plaintiff; and he denies that he has any knowledge or information sufficient to form a belief as to what was said, done, known, or unknown by said company, or any of its agents, subsequent to such payment, in regard to said purchase, or any facts or circum-
21 stances relating thereto, except that on or about the month of December, 1880, said defendant transmitted to this plaintiff a deed for said lands in pursuance of said contract of purchase executed by said company.

And this plaintiff denies that said contract was made out or signed or said deed procured from said defendant with the intent or for the purpose on the part of the plaintiff, or any other person to the knowledge of this plaintiff, of defrauding said defendant of its lands for the joint benefit of any persons whatsoever, or with any intent or purpose to defraud the defendant in any way or manner whatever; but the plaintiff avers that said defendant owned the lands herein described; that plaintiff desired to purchase them, and made defendant an offer therefor; that said offer was accepted; that plaintiff paid for said lands in accordance with said offer and acceptance in good faith and received a contract of sale of said lands, and that subsequently said defendant, in pursuance of the covenants in said contract contained, made and delivered to this plaintiff a deed of said lands.

22 And this plaintiff denies that said defendant has ever disaffirmed or rescinded said sale, or has ever offered to rescind said sale.

And the plaintiff admits that said defendant has filed a bill in chancery in the United States circuit court against this plaintiff and said Power and Kindred, and that this plaintiff has appeared in said action, and that said suit still remains pending and undetermined.

And this plaintiff further admits that the logs described in said complaint were cut upon the lands in said deed of conveyance described, but he denies that he has no title thereto.

And, for his reply to the second defense set up in said answer, the plaintiff admits that said logs were cut upon said lands by the Knife Falls Lumber Company, but he denies that the same were cut by said company with the knowledge, assent, or license of the plaintiff. And he admits that said Knife Falls Lumber Company sold the same to the defendant, but he avers that said defendant, at the
23 time it so purchased said logs, well knew that the same had been wrongfully and unlawfully cut and taken from the lands of this plaintiff by said Knife Falls Lumber Company.

And the plaintiff further denies each and every allegation in the

defendant's answer contained, and each and every part thereof, except as the same are herein qualified, explained, or admitted.

Wherefore he demands judgment as prayed for in said complaint.

ENSIGN & CASH &
WILSON & LAWRENCE,
Att'ys for Plaintiff.

STATE OF MINNESOTA, } ss:
County of St. Louis, }

J. D. Ensign came before me personally and, being duly sworn, doth say that he is one of the plaintiff's attorneys in the above-entitled action; that the foregoing reply is true, to the best of his knowledge, information, and belief, and that the reason why this verification is not made by said plaintiff is that he is absent from the county of St. Louis, Minnesota, where resides this affiant, his attorney.

24 J. D. ENSIGN.

Subscribed & sworn to before me on this third day of October, 1881.

[NOTARIAL SEAL.] DANIEL G. CASH,
Notary Public, St. Louis Co., Minnesota.

(Endorsed:) Filed Oct. 28, 1881. J. R. Carey, clerk.

STATE OF MINNESOTA, } ss:
County of St. Louis, }

I, J. R. Carey, clerk of the district court, 11th judicial district, within and for said county, the same being a court of record, do hereby certify that I have carefully and diligently compared the foregoing copy of the reply in an action wherein Mark Paine is plaintiff and the Northern Pacific Railroad Company defendant, and that the same is a true and correct copy thereof and therefrom, the original of which is now on file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Duluth, on this 4th day of November, A. D, 1881.

[Seal of Court.]

J. R. CAREY, *Clerk.*

25 STATE OF MINNESOTA, *St. Louis County:*

District Court.

MARK PAINE *vs.* NORTHERN PACIFIC RAILROAD COMPANY.

To the honorable the court aforesaid:

Your petitioner, The Northern Pacific Railroad Company, respectfully states that it is a corporation organized and existing under that certain act of the Congress of the United States approved July 2. A. D. 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to

Puget Sound, on the Pacific coast, by the northern route," and under those certain other acts and joint resolutions of Congress relating to the same subject-matter; that issue has been joined in said suit by the service upon this defendant, on October 3rd, 1881, of the reply of the plaintiff therein to the answer of this defendant; that no term of the said court has yet been held, save the one be-
26 ginning on this day, at which the said suit could have been been or could be tried, and that the defendant has a defense to said suit arising under the laws of the United States.

Wherefore the said defendant prays that the said suit be removed into the circuit court of the United States for the district of Minnesota for further proceedings therein, in accordance with the act of Congress for such case made and provided.

GILMAN & CLOUGH,
Att'ys for Petitioner.

STATE OF MINNESOTA, }
Ramsey County, } ss:

Personally came before the undersigned, a notary public in and for said county, W. P. Clough, who, having been by me first duly sworn, did depose and say that he is attorney for the defendant in the above-entitled action, and that the facts set forth in the foregoing petition are true, to the best of his knowledge, information, and belief.

W. P. CLOUGH.

Subscribed and sworn to before [me] on this 17th day of October, A. D. 1881.

[SEAL.] OTTO KUEFFNER,
Notary Public, Ramsey Co., Minn.

27 (Indorsed:) Filed Oct. 28, 1881. J. R. Carey, clerk.

STATE OF MINNESOTA, }
St. Louis County, } ss:

District Court.

MARK PAINE *vs.* NORTHERN PACIFIC RAILROAD COMPANY.

Know all men by these presents that we, Wm. Crooks and W. P. Clough, sureties of the Northern Pacific Railroad Company, the defendant above named, are held and firmly bound unto Mark Paine, the plaintiff above named, in the sum of one thousand dollars, lawful money of the United States, for payment whereof, well and truly to be made, we hereby bind ourselves, our legal representatives, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated on the 17th day of October, 1881.

Whereas the said Northern Pacific Railroad Company has
28 filed its petition in the said court praying for the removal of the suit above entitled into the circuit court of the United States for the district of Minnesota:

Now, therefore, if the said Northern Pacific Railroad Company

shall enter in the said circuit court of the United States for the next session thereof a copy of the record in the said suit and shall pay all costs that may be awarded by the said circuit court if such court shall hold that said suit was wrongfully or improperly removed thereto, then the above bond to be void; otherwise to remain of full force.

WM. CROOKS. [SEAL.]
W. P. CLOUGH. [SEAL.]

STATE OF MINNESOTA, } ss:
Hennepin County, }

Personally came before the undersigned, a notary public in and for said county, Wm. Crooks & W. P. Clough, who acknowledged that they executed the foregoing instrument voluntarily.

Dated October 17, 1881.

[NOTARIAL SEAL.] M. L. KNOWLTON,
Notary Public, Hennepin Co., Minnesota.

29 STATE OF MINNESOTA, } ss:
County of Hennepin, }

Personally came before the undersigned, a notary public in and for said county, Wm. Crooks & W. P. Clough, who, having been by me first duly sworn, did depose and say, each for himself, that he is a resident and freeholder of the said State and is worth the sum of one thousand dollars above debts, liabilities, and property exempt from levy and sale under execution.

WM. CROOKS.
W. P. CLOUGH.

Subscribed & sworn to before me on this 17th day of October, A. D. 1881.

[NOTARIAL SEAL.] M. L. KNOWLTON,
Notary Public, Hennepin Co., Minn.

(Indorsed:) Filed Oct. 28, 1881. J. R. Carey, clerk.

30 *Order.*

District Court.

STATE OF MINNESOTA, *St. Louis County:*

MARK PAINE
vs.
NORTHERN PACIFIC RAILROAD COMPANY.

The defendant in the above-entitled suit having applied to the court for the removal of the said cause into the circuit court of the United States for the district of Minnesota, in accordance with the act of Congress for such case made and provided, and having tendered a bond as surety for the doing by it of the several acts by the said statute required in such cases:

Now, therefore, it is hereby ordered that the said surety be accepted and the said application be granted.

By the court.

O. P. STEARNS, *Judge*.

(Indorsed:) Filed Oct. 28, 1881. J. R. Carey, clerk.

31 STATE OF MINNESOTA, } ss:
County of St. Louis, }

I, J. R. Carey, clerk of the district court 11th judicial district within and for said county, the same being a court of record, do hereby certify that I have carefully and diligently compared the foregoing copies of petition, bond, and order of court for removal in an action wherein Mark Paine is plaintiff and the Northern Pacific Railroad Company defendant, and that the same are true and correct copies thereof and therefrom, the originals of which are now on file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Duluth, on this 4th day of November, 1881.

[Seal of Court.]

J. R. CAREY, *Clerk*.

(Endorsed:) Return from State court. Filed Dec. 12, 1881. H. E. Mann, clerk.

The Answer of the Defendant to the Complaint of the Plaintiff.

32 STATE OF MINNESOTA, *St. Louis County*:

District Court.

MARK PAINE, Plaintiff,

vs.

NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

I.

The defendant admits that it is a corporation, as in the complaint alleged.

The defendant denies that the plaintiff ever was the owner of any of the logs in the complaint described, and denies that the defendant ever wrongfully or unlawfully took possession of any of the said logs, and denies that the defendant ever wrongfully or unlawfully detained any of the said logs from the plaintiff, and denies that the defendant ever wrongfully or unlawfully converted any of the said logs to its own use, and denies that said logs were of any greater value than seven thousand eight hundred and thirty-two dollars ($7,832).

33 II.

For a second and further defense the defendant alleges the following-mentioned facts—that is to say:

Prior to the employment by the defendant of James B. Power and Charles F. Kindred, as hereinafter set forth, the defendant had acquired, under and in pursuance of the acts of Congress relating to the defendant, and by reason of the construction of portions of the defendant's line of railroad, authorized by said acts to be built, large quantities of land, situated in the State of Minnesota and elsewhere.

Heretofore, and on or about, A. D. 1875, the defendant employed the said Power and Kindred respectively, and they respectively engaged to serve the defendant at agreed rates of compensation, as its agents, respecting the care, management, and sale of its said lands, and thereupon they, the said Power and Kindred, at or about the date last aforesaid, actually entered into the service of the defendant as such agents, and they continued thereafter to be employed
34 by and to serve the defendant as such agents until they were respectively dismissed by your orator from its service, the said Charles F. Kindred in December last and the said James B. Power in the fore part of the present year. During all the period of time the said Power and Kindred were so engaged in the service of the defendant their duties were, among other things, to negotiate sales of the said lands of the defendant, and in the defendant's name and behalf to enter into written contracts for such sales, but to negotiate sales and enter into contracts for sales of lands only with actual and *bona fide* purchasers, and at prices which should represent the fair value of the lands sold, such prices not to be less, in any case, than a valuation to be put upon the same prior to offering the same for sale, in accordance with a system adopted by the defendant for the appraisal of its said lands, in force during all the period of the employment of the said Power and Kindred,
35 to sell such of the said lands as might be valuable for the timber standing or growing thereon only in small lots and to actual settlers, and at prices based upon the quantity of timber standing upon the land, in addition to the price of the land itself; to collect and receive from purchasers of lands and to pay over to other agents of the defendant authorized to receive the same from time to time as the same should be collected by them the proceeds of the sales of lands, whether in money or in the preferred stock of the defendant, and, in general, to look after and promote the interests of the defendant in all things concerning the care, management, valuation, and sale of the defendant's said lands.

That said Power, during the period aforesaid, had chief control over the defendant's said business during part of the time of his employment under the title "general land agent" and during the remainder of such time under the title of "land commissioner" of the defendant, while the said Kindred participated in the management of such business subject to the supervision of the said
36 Power and next in authority to him in such business under the designation of "chief clerk" of the defendant's land department.

The plaintiff herein, Mark Paine, has, as this defendant is informed and believes, at divers times during the period of the employ-

ment of the said Power and Kindred, engaged in speculative operations with lands acquired from the defendant through the assistance of and in connection with the said Power and Kindred prior and in addition to the transactions in such lands hereinafter mentioned.

During all the period of the said employment of the said Power and Kindred a large number of shares of the defendant's capital stock were outstanding, commonly known and designated as the defendant's "preferred stock," which shares of preferred stock were, during all the said period, receivable by the defendant according to the terms of such stock itself, and under the rules and laws of the defendant, at the par value thereof, in payment of the purchase price of those of the said lands of the defendant, situated in the
37 State of Minnesota.

Such preferred stock did not, at the time when the transaction occurred which is hereinafter stated, have a market value exceeding sixty (60) or sixty-five (65) per centum of the par value thereof.

Notwithstanding the duty of the said Power and Kindred towards the defendant, as its agents as aforesaid, some time about the latter part of the year 1880 or the fore part of the present year they, the the said power and Kindred, as the defendant is informed and believes, wrongfully and fraudulently conspired together and with the plaintiff herein, Mark Paine, and they did, with the aid and assistance of the said Paine, actually deprive the defendant of the benefits which it ought to and otherwise would have derived from the ownership and sale of a large quantity of its said land, and thereby wrongfully and fraudulently obtained the legal titles to a large quantity of such lands for their own private use and benefit at a very small fraction of the actual value of the same—that is to say: At some time about the close of the year 1880 or the
38 fore part of the present year, but at what precise time this defendant is ignorant, the said Power, pretending to act for the defendant, made out and signed, or permitted some other person to sign for him, a certain instrument in writing, which was dated on October 9, A. D. 1880, and which was in the form of the contracts then in general use in the defendant's land department for the sale of lands by the defendant, which instrument purported upon its face to be a contract between this defendant and the plaintiff, Mark Paine, for the sale and conveyance by the defendant to the said Paine of all the following-described lands, situated in the county of St. Louis and State of Minnesota—that is to say:

Lots numbered nine (9), ten (10), and eleven (11), in section numbered fifteen (15), and the east half (½) of the southeast quarter (¼) and the northwest quarter (¼) of the southeast quarter (¼), and the southwest quarter (¼) of section numbered seventeen (17), and the northeast quarter (¼) of the northeast quarter (¼) of section numbered nineteen (19) and lots numbered three (3), four (4), five
39 (5), six (6), eight (8), nine (9), ten (10), and eleven (11), and the west half (½) of the northwest quarter (¼) and the northwest quarter (¼) of the southeast quarter (¼) of the southeast quarter (¼) of the northeast quarter (¼) of section num-

bered twenty-one (21), and the northwest quarter (¼) of the northeast quarter (¼) and the south half (½) of the northwest quarter of section numbered twenty-three (23), and the northwest quarter of the southwest quarter (¼) of section numbered twenty-seven (27), and lots numbered one, two, and nine (1, 2, and 9), and the southeast quarter (¼) of the northeast quarter (¼) and the southeast quarter (¼) of section numbered twenty-nine (29), all in town numbered fifty-five (55) of range numbered nineteen (19), containing fourteen hundred and eighty (1,480) acres, at the price of two dollars and fifty cents ($2.50) per acre, or three thousand seven hundred dollars ($3,700) in all; all which lands were then exclusively the lands of the defendant obtained by it under the said acts of Congress in the manner aforesaid.

40 All, or nearly all, the said lands, at the time of the making out and signing, as aforesaid, of the said pretended contract were, and by the said Power and Kindred and the plaintiff herein were then well known to be covered with a dense growth of pine timber of the best quality, which timber alone then was, as they, the said Power and Kindred and the plaintiff herein, each and all well knew, of an actual cash value of at least thirty thousand dollars ($30,000), and the said lands then were, as they, the said Power and Kindred and the plaintiff herein, well knew, and the same have since remained, of an actual cash value of at least ten times the sum named in the said pretended contract as the purchase price of the same.

At or about the time of the making out and signing of the said pretended contract the said power and Kindred and the plaintiff, or some of them, for and on behalf of all of them, as the defendant is informed and believes, obtained certain shares of the said preferred stock equal in face value to the sum named in the

41 said pretended contract as the price to be paid to the defendant for such lands, and the said Power tendered the same to the defendant as having been paid to him upon the said contract, and he, the said Power, of his own will, and at the same time being instigated, as the defendant is informed and believes by the said Kindred and the plaintiff herein, represented to the defendant that the said pretended contract was *bona fide* and actual, and one which it would be for the interest of the defendant to carry out, at the same time carefully concealing from the defendant the fact that valuable timber was standing upon such lands, and carefully concealing from the defendant the actual value of such lands; and thereupon the defendant, being ignorant of the purposes of the said Power and Kindred and of the plaintiff as aforesaid, and being ignorant that the said lands were pine timbered lands and of their value, and not having any reason to believe that either the said Power or Kindred was interested in said purchase, but relying upon the said

42 Power, as he, the said Power, and he, the said Kindred, and he, the plaintiff, well knew, to protect the interests of the defendant in the premises, the defendant accepted the said shares of preferred stock and executed and placed in the hands of the said Power, for delivery to the plaintiff herein, a deed of all the said lands running to the said Paine as grantee.

And this defendant, from information and belief, charges the fact to be that the said pretended contract was made out and signed and the said deed was procured from the defendant with the intent and purpose on the part of the said Power, Kindred, and the plaintiff of enabling them to defraud the defendant of the said lands for their joint and mutual benefit.

The defendant did not learn that the said lands were pine timbered lands, nor the value of the same, nor did it have any reason to suspect the said fraudulent conduct of the said Powers,
43 Kindred, and the plaintiff until some time in the month of April, A. D. 1881, whereupon the defendant forthwith repudiated and disaffirmed such sale, and duly filed in the circuit court of the United States for the district of Minnesota its bill in chancery setting forth the facts hereinbefore stated, and praying as relief that the said fraudulent purchase be annulled and that the said lands be released and reconveyed to this defendant. The said Power and kindred and the plaintiff herein were severally made parties defendant to the said bill, and were duly served with process issued out of the said circuit court thereon and duly appeared in such suit, which still remains pending and undetermined.

This defendant is ready and willing to restore to the plaintiff or to the said Power or Kindred the actual cost to him or them of the said shares of prepared stock, turned over as aforesaid to the defendant in payment for the said lands, upon release and reconveyance of the said lands to the defendant. The logs described in the complaint were all cut upon the said lands, and the plain-
44 tiff has no title to the same save as resulting from the said fraudulent purchase of the said lands themselves.

III.

For a further defense, all and singular, the said logs were cut upon the said lands by the Knife Falls Lumber Company, a corporation organized and existing under the laws of this State, as the defendant is informed and believes, with the full knowledge, assent, and license of the plaintiff herein; and it, the said lumber company, long prior to the commencement of this action and before this defendant took possession of said logs, duly sold, assigned, and delivered all of the said logs and the possession thereof to this defendant.

Wherefore the defendant prays the judgment of the court—

1st. That the said plaintiff take nothing by his said action.

2nd. That the said pretended purchase of the lands hereinbefore described be adjudged null and void as against this defendant.

3rd. That an account be taken of the cost of the said
45 shares of preferred stock turned over to the defendant in payment for the said lands, and that upon the repayment by the defendant of such cost the plaintiff release and reconvey all and singular the said lands to the defendant.

4th. That the defendant have such further and other relief as to the court may seem meet.

GILMAN & CLOUGH,
Atty's for Defendant.

3—90

STATE OF MINNESOTA, } ss:
County of Ramsey, }

W. P. Clough came before me personally, and, being duly sworn, doth say that he is one of the attorneys of the defendant in the above-entitled action; that the foregoing pleading is true to the best of his knowledge, information, and belief, and that the reason why this affidavit of verification is not made by an officer of the defendant is that all the officers of the defendant are absent from the county of Ramsey, Minnesota, where reside defendant's attorneys; and further saith not.

W. P. CLOUGH.

46 Subscribed and sworn to before me this 27th day of June, 1881.

[NOTARIAL SEAL.] OTTO KUEFFNER,
Notary Public, Ramsey Co., Minn.

(Endorsed:) Filed June 27, 1882. H. E. Mann, clerk, by O. J. Reynolds, deputy.

United States Circuit Court, District of Minnesota.

MARK PAINE *vs.* NORTHERN PACIFIC RAILROAD COMPANY.

We hereby associate Messrs. Wilson & Lawrence with us as attorneys of record in the above-entitled action and consent and agree that all pleadings, notices, and other papers required to be
47 served by or upon the plaintiff's attorneys in this action may be served by or upon the above-named Wilson and Lawrence with like force and effect as if such pleadings, notices, and other papers were served upon the undersigned.

Dated Dec. 26, 1881.

ENSIGN & CASH,
Att'ys for Pl'ff.

(Endorsed:) Filed Dec. 29, 1881. H. E. Mann, clerk.

United States Circuit Court for District of Minnesota. Term Minutes, June Term, A. D. 1882.

JUNE 27, 1882.

Present: Hon Rensselaer R. Nelson, Hon. Samuel Treat, judges.

MARK PAINE *vs.* NORTHERN PACIFIC RAILROAD CO.

On motion of the plaintiff's attorney, ordered that he have leave to file a supplemental reply.

48 United States Circuit Court, District of Minnesota.

MARK PAINE *vs.* NORTHERN PACIFIC RAILROAD COMPANY.

The plaintiff, for supplemental reply to the answer in the above-entitled action, alleges:

That the above action was brought in the district court of Minne-

sota for the county of St. Louis, and after issue joined was removed upon petition of defendant to this court and to the June term thereof of 1881.

That prior to the commencement of this action a suit in equity was commenced in this court in which the said Northern Pacific Railroad Company was complainant and the said Mark Paine and James B. Power and Chas. F. Kindred were defendants, and that said suit is the same suit mentioned and set forth in defendant's answer herein.

49 That the complainant's bill in said suit set forth all the matters and things set forth in the answer herein regarding the contract and purchase by said Mark Paine of the defendant herein of the land mentioned, and did also set forth all the allegations of fraud and collusion connected with said purchase and in the same manner and to the same purport as set forth in the answer herein. And the said bill prayed that said conveyance be declared fraudulent and void, and that said Mark Paine be ordered to convey the said land to said Northern Pacific Railroad Company upon being repaid the purchase-money of the same.

That the allegations of said bill were fully denied by the answers of said defendants therein, and that the issues thereby framed were the same as made by the pleadings herein, so far as all matter of fraud and collusion and as to all matters tending to a re-cission of said sale of said land by defendant to plaintiff.

50 And plaintiff further says that on the 21st day of June the said suit in equity was brought on for hearing upon the issues therein, and that this court, after the hearing thereof, ordered a decree dismissing said bill, which said decree was entered accordingly.

(Endorsed:) Filed June 27, 1882. H. E. Mann, clerk.

51 United States Circuit Court for the District of Minnesota.
Term Minutes, June Term, A. D. 1882.

JUNE 27, 1882.

Present: Hon. Rensselaer R. Nelson, Hon. Samuel Treat, judges. Before Hon. R. R. Nelson, judge.

MARK PAINE *vs.* NORTHERN PACIFIC RAILROAD COMPANY.

This cause being reached on the calendar and called, the plaintiff appeared by E. M. Wilson, Esq., and the defendant by W. P. Clough, Esq.

The defendant moves for a continuance, which motion is argued and submitted, and it is ordered by the court that said motion be granted, unless the plaintiff withdraws his supplemental reply from the files. And the plaintiff withdrawing the same, thereupon a jury is called, who came, to wit: Frank Chambers, Joseph Guion, R. A. Lampher, W. H. Shelly, P. F. Flynn, Daniel McCaine, Timothy Mitchell, James O'Brien, L. L. Benson, John B. Spencer, Charles Friend, G. C. Lynch, who are duly impaneled and sworn.

E. McWilson, Esq., opens the case for plaintiff.
James Paine is sworn & examined as a witness for plaintiff.
Mark Paine " " " " " " "
Harrison L. Ware " " " " " " "
William H. Wilson " " " " " " "
John Flemming " " " " " " "
And here the plaintiff rests.

52 The defendant made a motion that the court instruct the jury to find a verdict for the defendant, which motion after argument is by the court denied.

Henry Bradenburg is sworn & examined as a witness for defendant.
John Grady " " " " " " "
Justia Smith " " " " " " "
Phillip M. Ranney " " " " " " "
John Nelson " " " " " " "
Chas. A. Moore " " " " " " "
And here the defendant rests.

Mark Paine is recalled & further examined as a witness for plaintiff.
Plaintiff rests.

W. P. Clough, Esq., sums up for the defendant.
E. M. Wilson, Esq., sums up for the plaintiff.

Charge is given the jury by the court, and they retire in charge of an officer duly sworn and qualified to attend them to consider of their verdict.
Parties consent that jury may bring in a sealed verdict in the morning.

53 United States Circuit Court for the District of Minnesota.
Term Minutes, June Term, A. D. 1882.

MARK PAINE *vs.* NORTHERN PACIFIC RAILROAD COMPANY.

JUNE 28, 1882.

Present: Hon. Rensselaer R. Nelson, Hon. Samuel Treat, judges.
Before Hon. R. R. Nelson, judge.
The parties appeared by their respective attorneys, and the jury being returned into court say they find a verdict for the plaintiff and assess his damages at the sum of $10,918.42.
On motion of defendant, ordered that all proceedings herein be stayed for twenty days.

54 We the jury in the case of Mark Paine *vs.* The Northern Pacific Railroad Company, find for the plaintiff and assess his damages at the sum of ($10,918.42) ten thousand nine hundred eighteen & $\frac{42}{100}$ dollars.

DANIEL McCAINE
Foreman.

Endorsed: Filed June 28, 1882. H. E. Mann, clerk, by O. J. Reynolds, deputy.

55 *Bill of Exceptions.*

In the Circuit Court of the United States for the District of Minnesota.

MARK PAINE, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY.

This cause came on to be tried before the court and a jury at the June term thereof in the year 1882. And thereupon the plaintiff, to maintain the issues on his part, produced the following-named witnesses—that is to say: J. M. Paine, Mark Paine, H. L. Wiard, W. H. Wilson, and J. F. Flemming, each of which said witnesses testified solely as to the quality and value of the logs in controversy in the suit, excepting that the witnesses W. H. Wilson and J. F. Flemming testified, among other things, that they examined the said logs about April 22, 1882, and the land from which they were cut, and that said logs were then banked upon the bank of the St.
56 Louis river, and had been cut that winter; thereupon the plaintiff, having introduced no further evidence than the said testimony of the said witnesses, rested his case.

The defendant then moved the court to instruct the jury to find a verdict for the defendant on the ground that the plaintiff had failed to produce any evidence showing a right to recover in this action.

The court overruled the motion, and the defendant excepted.

To maintain the issues on his part the defendant called as a witness H. Brandenburgh, who testified in substance that in the fall of the year 1879, or in the winters of the years 1879 and 1880, James B. Power, then land commissioner of the Northern Pacific Railroad Company, gave to the Knife Falls Lumber Company a verbal license to cut logs upon the tract of land mentioned in the complaint in this suit; that in pursuance of that license the logs in controversy were cut by the said lumber company; that the said lumber company never had any notice of the revocation of the said
57 license; that on February 3, 1881, the witness, as agent of the lumber company received a letter from said Power, as land commissioner of the Northern Pacific Railroad Company, which letter is hereto annexed, and that the said letter related to the cutting of the logs mentioned in the complaint.

The defendant then offered the letter in evidence.

To this offer the plaintiff objected, on the ground that the said letter was incompetent & immaterial.

The court sustained the objection, and the defendant excepted.

The said witness further testified in substance as follows:

"I met the plaintiff, Mark Paine, on the train between Duluth and Northern Pacific Junction, after the cutting of the logs and some time in the month of April, 1881. We had a conversation about the cutting of the logs in controversy. I said to him that we had cut the logs under a permit from the company, and that he knew we were doing so while we were cutting, and that he should have let

us know in case he had objection to our doing it. He said it
58 was our business to know on whose land we were cutting; also, that it didn't make any difference to him, if we had a mind to cut logs for him. He also said that one McLanson had told him about our cutting. When I told him that we were cutting under a permit from the company, and that he knew it, he did not dispute me."

The defendant thereupon again offered the said letter in evidence.

The *defendant* objected to the same on the ground that it was incompetent and immaterial.

The court sustained the objection, and the defendant duly excepted.

John Grady, a witness produced and sworn on the part of the defendant, testified, among other things, that he superintended the cutting of the logs in question from the land described in the pleadings and that the said cutting was not commenced until December 18, 1881.

Mark Paine, the plaintiff, being recalled in rebuttal in his own behalf, testified that he did not know of the cutting of said logs until the same had been cut, and that he did not say or admit to
59 witness, Brandenburgh, that he knew the Knife Falls Lumber Company were cutting timber under a permit from the company.

Evidence having been given as aforesaid the defendant requested the court to instruct the jury as follows: "If the jury believe that the Northern Pacific Railroad Company gave a license to the Knife Falls Lumber Company to cut logs upon the lands described in the complaint while the said railroad company was owner of the said lands, and that the said lumber company cut the logs described in the complaint, acting under such license, and that the plaintiff knew of the existence of such license and knew that the said lumber company was cutting such logs acting under the said license and made no objection to such cutting, in such case the jury would be at liberty to find that the said cutting was with the license and permission of the plaintiff; and if the jury does so find it should find a verdict for the defendant."

The court refused to so instruct the jury; to which refusal
60 the defendant then and there duly excepted.

The court then instructed the jury that the only issue under the pleadings in the case to be tried by the jury was the value of the logs mentioned in the complaint at the time and place when the same were taken possession of by the defendant; to which instruction the defendant then and there duly excepted.

The court further instructed the jury that there was no evidence in the case tending to show that the logs in controversy were cut with the license of the plaintiff.

To which instructions defendant's counsel then and there excepted.

And because none of the matters aforesaid appear of record in the

said cause I have caused the aforesaid exceptions to be reduced to writing, as witness my hand this 19th day of July, A. D. 1882.

R. R. NELSON, *Judge.*

(Endorsed:) Filed July 19, 1882. H. E. Mann, clerk, by O. J. Reynolds, deputy.

61 *Amendments on Part of Plaintiff to the Bill of Exceptions Proposed on Part of the Defendant.*

In Circuit Court of the United States, District of Minnesota.

MARK PAINE *vs.* NORTHERN PACIFIC RAILROAD COMPANY.

I.

By adding and inserting on first page and immediately after the words "testified solely as to the quality and value of the logs in controversy in the suit" the following: Excepting that the witnesses, W. H. Wilson and J. F. Flemming, testified, among other things, that they examined said logs about April 22, 1882, and the land from which they were cut; that said logs were then banked upon the bank of the St. Louis river, and had been cut that winter.

II.

Add and insert on third page and immediately before the words "Evidence having been given as aforesaid the defendant
62 requested the court to instruct the jury" the following words: "John Grady, a witness produced and sworn on the part of defendant, testified, amid other things, that he superintended the cutting of the logs in question *from the cutting of the logs in question* from the land described in pleadings and that the said cutting was not commenced until December 18, 1881."

III.

Add and insert immediately after the said second amendment the following: "Mark Paine, the plaintiff, being recalled in rebuttal in his own behalf, testified that he did not know of the cutting of said logs until the same had been cut, and that he did not say or admit to witness Brandenburg that he knew the Knife Falls Lumber Company were cutting under a permit from the company."

E. M. WILSON,
Pff's Att'y.

(Endorsed:) Filed July 19, 1882. H. E. Mann, clerk, by O. J. Reynolds, deputy.

63 United States Circuit Court for the District of Minnesota.

Term Minutes, June Term, A. D. 1882.

JULY 18, 1882.

Present: Hon. Rensselaer R. Nelson, Hon. Samuel Treat, judges. Before Hon. R. R. Nelson, judge.

MARK PAINE *vs.* NORTHERN PACIFIC RAILROAD COMPANY.

A bill of exceptions in this cause being settled and filed the de-

fendant moves for an order vacating and setting aside the verdict rendered by the jury herein and for a new trial, and it is ordered that the said motion be, and it is hereby, set down for hearing on Monday, the 11th day of September, A. D. 1882, at the opening of court on that day, or as soon thereafter as counsel can be heard; and on motion of defendant it is further ordered that all further proceedings herein be, and the same are hereby, stayed until the said 11th day of September.

64 In the Circuit Court of the United States, District of Minnesota.

MARK PAINE, Plaintiff,
agst.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

It is hereby ordered that the stay of proceedings in the above-entitled case be, and the same hereby is, extended to the fourth Monday of October next, being the twenty-third day of said October.

Sept. 22, 1882.

R. R. NELSON, *Judge.*

(Endorsed:) Filed Sept. 25, 1882. H. E. Mann, clerk, by O. J. Reynolds, deputy.

65 United States Circuit Court for the District of Minnesota. Term Minutes, June Term, A. D. 1882.

MARK PAINE *vs.* NORTHERN PACIFIC RAILROAD COMPANY.

OCTOBER 23, 1882.

Present: Hon. Rensselaer R. Nelson, judge.

Pursuant to the arrangement and stipulation of counsel, ordered that the motion of the defendant to set aside the verdict of the jury in this case and for a new trial therein be, and it is hereby, set down for argument on the fourth day of November, A. D. 1882, at the opening of court on that day or as soon thereafter as counsel can be heard. And it is further ordered that all further proceedings herein be stayed until said November 4th.

66 United States Circuit Court for the District of Minnesota. Term Minutes, June Term, A. D. 1882.

MARK PAINE *vs.* NORTHERN PACIFIC RAILROAD COMPANY.

NOVEMBER 1, 1882.

Present: Hon. Rensselaer R. Nelson, judge.

Ordered, That the motion of the defendant in this cause to set aside the verdict of the jury and for a new trial therein, which was set for hearing on the 4th day of November, be continued, and that the same be, and it is hereby, set for hearing on the 15th day of November, A. D. 1882, at the opening of court on that day, or as soon thereafter as counsel can be heard.

67 United States Circuit Court for the District of Minnesota.
Term Minutes, June Term, A. D. 1882.

MARK PAINE *vs.* NORTHERN PACIFIC RAILROAD COMPANY.

NOVEMBER —, 1882.

Present: Hon. Rensselaer R. Nelson, judge.

The motion of the defendant to set aside the verdict of the jury herein and for a new trial coming on to be heard, E. M. Wilson, Esq., appeared for the plaintiff and W. P. Clough, Esq., for the defendant, and the said motion was submitted to the court upon briefs to be furnished.

68 United States Circuit Court for the District of Minnesota.
Term Minutes, December Term, A. D. 1882.

MARK PAINE *vs.* NORTHERN PACIFIC RAILROAD COMPANY.

DECEMBER —, 1882.

Present: Hon. Rensselaer R. Nelson, judge.

A motion for a new trial having been heretofore submitted and taken under advisement, and the court now being fully advised in the premises, it is ordered that the said motion be, and it is hereby, denied, and the defendant praying for a writ of error, ordered that the same be, and it is hereby, allowed.

69 *Bill of Costs & Notice of Taxation.*

United States Circuit Court, District of Minnesota.

MARK PAINE *vs.* NORTHERN PACIFIC RAILROAD COMPANY.

Costs by statute	$20	
Affidavits, 2		50
Marshal's fees, service of subpœnas		2 22
Clerk's fees		15 65
Witness fees:		
J. M. Paine, two days' attendance & 260 miles' travel	16	
H. L. Wiard, 2 days' attendance & 260 miles' travel	16	
H. H. Wilson, 2 days' attendance and 260 miles' travel	16	
J. F. Flemming, 2 days' attendance and 24 miles' travel	4 20	
Costs taxed at	$90 57	

Jan'y 9, 1883.

H. E. MANN, *Clerk*,
By O. J. REYNOLDS, *Deputy*.

4—90

STATE OF MINNESOTA, } ss:
County of Hennepin, }

Eugene M. Wilson, being duly sworn, says that he is one of the attorneys of the plaintiff in the above-entitled action, and that the
70 above-specified items of disbursements have been necessarily made or incurred therein by said plaintiff.

EUGENE M. WILSON.

Subscribed and sworn to before me this 5th day of January, A. D. 1883.

[NOTARIAL SEAL.] HENRY R. HIGGINS,
Notary Public, Minn.

United States Circuit Court, District of Minnesota.

MARK PAINE *vs.* NOETHERN PACIFIC RAILROAD COMPANY.

SIR: Take notice that we shall apply to the clerk of said court on the ninth day of January, A. D. 1883, at 10 o'clock in the forenoon, to tax and insert in the judgment then and there to be entered in favor of the plaintiff and against the defendant the foregoing
71 items of costs and disbursements.

WILSON & LAWRENCE.

STATE OF MINNESOTA, } ss:
Hennepin County, }

Henry R. Higgins, being duly sworn, deposes and says that at Minneapolis, in said county, on Friday, January 5, 1883, he served the within affidavit of costs and notice on Gilman & Clough, att'ys for defendant, by then and there depositing in the post office a true copy thereof, with the lawful postage thereon fully prepaid, directed to said Gilman & Clough at St. Paul, Minnesota, their place of business and residence.

HENRY R. HIGGINS.

Subscribed & sworn to before me January 8, 1883.

[NOTARIAL SEAL.] JAMES W. LAWRENCE,
Notary Public, Minn.

(Endorsed:) Filed Jan'y 9, 1883. H. E. Mann, clerk, by O. J. Reynolds, deputy.

72 United States Circuit Court for the District of Minnesota.
Term Minutes, December Term, A. D. 1882.

MARK PAINE *vs.* NORTHERN PACIFIC RAILROAD COMPANY.

JANUARY 9, 1883.

Present: Hon. Rensselaer R. Nelson, judge.

This cause having been heretofore tried before a jury, who, on the 28th day of June, A. D. 1882, found a verdict for the plaintiff and assessed his damages at $10,918.42, and the defendant having made

a motion for a new trial, which was on the 18th day of December, A. D. 1882, by the court overruled:

Now, the plaintiff moving for judgment on the said verdict, it is by the court considered, ordered, and adjudged that the plaintiff do have and recover of and from the defendant the said sum of $10,918,42 and interest thereon from the time said verdict was rendered, to wit, the further sum of $407.61, in all amounting to eleven thousand three hundred twenty-six dollars and three cents ($11,-326.03), besides his costs by him in and about his suit in this
73 behalf expended, taxed at $90.57, and that execution issue therefor.

Judgment record signed this ninth day of January, A. D. 1883.

H. E. MANN, *Clerk*,
By O. J. REYNOLDS, *Deputy*.

(Endorsed:) Judgment roll. Filed January 9, 1883. H. E. Mann, clerk, by O. J. Reynolds, dep'y.

Endorsed on cover: Minnesota C. C. U. S. No. 90. The Northern Pacific Railroad Company, plaintiff in error, *vs.* Mark Paine. Filed 6th October, 1883.

119-561

Supreme Court of the United States.

OCTOBER TERM, 1886.

NO. 90.

THE NORTHERN PACIFIC RAILROAD COMPANY,
Plaintiff in Error.

vs.

MARK PAINE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

BRIEF FOR PLAINTIFF IN ERROR.

W. P. CLOUGH,
Of Counsel for Plaintiff in Error.

Supreme Court of the United States.

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NO. 90.

THE NORTHERN PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

vs.

MARK PAINE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

On May 18, 1881, Mark Paine began, in the district court of the State of Minnesota, an action at law, in the nature of trover, against the Northern Pacific Railroad Company, alleging the conversion by the latter of a quantity of pine saw logs claimed to have been his property, and of the value of $10,442.85. The facts constituting

Paine's title to the logs were not stated, and the allegation of ownership was in general words.

See Printed Record, pp. 4, 5.

The railroad company appeared in the same court, and filed an answer setting up three distinct defenses: two legal and one equitable.

See Printed Record, pp. 13-17.

This was permissable under the following clauses of the Minnesota Statutes regulating the procedure of its courts of general original jurisdiction:

96. (SEC. 79.) The answer of the defendant shall contain:

First—A denial of each allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

Second—A statement of any new matter constituting a defense or counter claim, in ordinary and concise language, without repetition.

Third—All equities existing at the time of the commencement of any action, in favor of a defendant therein, or discovered to exist after such commencement, or intervening before a final decision in such action, and if the same are admitted by the plaintiff, or the issue thereon is determined in favor of the defendant, he shall be entitled to such relief, equitable or otherwise, as the nature of the case demands, by judgment or otherwise.

98. (SEC. 81.) The defendant may set forth by answer as many defenses and counterclaims as he has; they shall each be separately stated, and refer to the causes of action which they are intended to answer, in such manner that they may be intelligibly distinguished; the defendant may also demur to one or more of several causes of action in the complaint, and answer the residue.

See Statutes of Minnesota, 1878, pp. 720, 721; chap. 66.

The legal defenses consisted, firstly, of a denial of Paine's ownership of the logs, and of any conversion

thereof by the railroad company: and, secondly, of an averment that the logs were cut by the Knife Falls Lumber Company, a corporation organized and existing under the laws of the State of Minnesota, with Paine's license, knowledge and consent, and that the same had, prior to the beginning of the action, been transferred by the lumber company to the railroad company.

See Answer, paragraphs II, III.

The equitable defense was, in substance, as follows:

In the year 1880, the railroad company was the sole owner of the lands whence the logs in controversy had been cut, as parcel of its congressional grant. At that time James B. Power was its land commissioner and Charles F. Kindred was the chief clerk in its land department under Power.

Power, Kindred and Paine conspired to defraud the railroad company, by procuring a sale from the defendant to Paine, for the benefit of all three, at a price representing but a small fraction of the actual value of the property.

To carry out their fraudulent purposes, Power, as land commissioner, made out and executed in the name of the company, a land contract in the form commonly used by it, promising, for a designated price, forming only about one-tenth of the real value of the property, to convey the same to Paine.

At, or shortly after this time, shares of preferred stock of the railroad company, which were receivable at par in the purchase of its lands, to the amount of the price designated in the contract, were obtained by one or all of

the three, and turned over to the company. Whereupon, the latter, in ignorance of the facts, and relying upon its agents, Power and Kindred, to protect it, made out a deed of conveyance, in usual form, describing the lands referred to, and running to Paine as grantee, and placed the same in the hands of Power for delivery to Paine.

See paragraph II of the Answer.

The relief prayed by the answer was:

First—That Paine take nothing by his action:

Second—That the pretended purchase of the lands in the name of Paine be adjudged void as against the railroad company.

Third—That an account be taken of the cost of the shares of preferred stock turned over to the railroad company in payment for the lands, and that on the repayment, by the railroad company, of such cost, Paine release and reconvey the lands to the former.

After the interposition of this answer, Paine made reply thereto, putting in issue the allegations of the equitable defense, and also those of the legal defense which set up license.

See Printed Record, pp. 5-10.

After issue had thus been joined in the suit, and before trial, the same was removed into the circuit court of the United States, for the district of Minnesota, by the railroad company.

Upon the arrival of the controversy in the United States court, the railroad company, deeming the two legal defenses which it had set up sufficient to defeat the ac

tion, elected to rely upon them; and, consequently, no repleader, converting the equitable defense into a bill in equity, was applied for by either party, or had.

Consequently, the case went to trial upon the pleadings as they had originally been framed in the state court. The case was tried before a jury, the district judge for the district of Minnesota presiding.

Under the rulings and instructions of the court, duly excepted to by the railroad company, the jury found a verdict in favor of Paine for the sum of $10,918.42.

A bill of exceptions was thereupon procured by the railroad company, and a motion for a new trial based thereon was made and overruled by the court. The opinion of the court assigning its reasons for overruling this motion, as reported in 14th Federal Reporter, p. 407, is hereto annexed.

Judgment having been entered in favor of Paine, upon the verdict, a writ of error was sued out by the railroad company, from this court, to reverse the same.

ASSIGNMENT OF ERRORS.

I.

The court erred in overruling the motion of the railroad company, made at the close of the plaintiff's case, to instruct the jury to find a verdict for the defendant, on the ground that the plaintiff had failed to produce any evidence showing a right to recover in this action.

II.

The court erred in refusing to give to the jury the instruction requested by the railroad company, which is contained in the Printed Record, on page 22, and which is hereinafter quoted.

III.

The court erred in instructing the jury that the only issue under the pleadings in the case, to be tried by the jury, was the value of the logs mentioned in the complaint, at the time and place mentioned when the same were taken possession of by the defendant.

IV.

The court erred in instructing the jury that there was no evidence in the case tending to show that the logs in controversy were cut with the license of the plaintiff.

POINTS AND AUTHORITIES.

I.

AT THE CLOSE OF PAINE'S CASE, HE HAD FAILED TO ADDUCE EVIDENCE SHOWING A CAUSE OF ACTION IN HIS FAVOR AGAINST THE RAILROAD COMPANY.

This proposition is true, because no evidence had been introduced tending to show that the title to the logs was in him. It may be further remarked, that this omission was not supplied at any subsequent stage of the trial. Paine's ownership was necessarily the foundation of his case. Such ownership could be established in proof, only by showing, either that he held the legal title to the land whereon the logs were cut, at the time the same were cut, and that the same were cut and removed from such land without his permission, expressed or implied, or that he had purchased the same after the cutting thereof from someone who did have the legal title thereto.

Besides, ownership to sustain an action of trover must be of the legal title. Equitable title is not sufficient. Ejectment, trespass and trover all require, in tribunals where law and equity are administered by separate proceedings, or in absence of statute to the contrary, the legal title in the plaintiff, to uphold them. This doctrine has been repeatedly applied by this court in cases of ejectment, and it is impossible to draw any distinction

between the different forms of action mentioned, in respect to this requisite.

Watkin *vs.* Holman, 16 Peters, 25.
Hickey *vs.* Stewart, 3 Howard, 750.
Agricultural Bank *vs.* Rice, 4 Howard, 225.
Smith *vs.* McCann, 24 Howard, 398.

It was not pretended upon the trial that Paine's ownership of the logs was derived from purchase thereof from any prior owner.

On the contrary, his claim of title was rested solely upon the proposition that, when the logs were cut, he was the owner of the lands on which the trees stood, and that the same were taken therefrom without his consent.

But no evidence was introduced upon the trial, by either party, as to the ownership of such lands.

To establish his own title thereto, Paine relied exclusively upon the allegations contained in paragraph II of the answer: that is to say, the equitable defense above mentioned.

But those allegations were insufficient to make out Paine's title to the land, or to the logs, for the purpose of an action in trover, for two reasons:

Firstly—Paragraph II, in the circuit court of the United States, where legal and equitable rights and remedies are kept separate, could not be regarded as any part of the pleadings in the case.

In the State court, paragraph II formed a legitimate and proper part of the pleadings. In that court, the matter of the allegations thereof could be considered in the trial of the cause. Proofs to establish the same could be adduced, and the proper relief, founded thereon, could be granted.

But, when the case reached the circuit court of the United States, paragraph II ceased any longer to form part of the pleadings in the suit. The court could take no notice of any of the allegations thereof. The railroad company was utterly debarred from offering evidence to establish the same; and even if all of the same had been admitted by Paine upon the trial, no relief whatever could have been granted by the court as a consequence thereof.

The allegations contained in this paragraph were not intermixed with those of a legal character. On the contrary, that paragraph stood separate and distinct from the legal defenses embodied in the same document, and as a complete bill in equity, filed to enjoin the further prosecution of the action.

Hence, when the issues which the court could try came on for trial, the court had no right to look into the contents of paragraph II for the purpose of determining what those issues were. But that is precisely what the court did. It undertook to treat as part of a common law record those portions of a strictly equitable pleading, which were supposed to be useful for Paine; while, at the same time, the railroad company was debarred from proving any of the other allegations, in the same connection, favorable for itself.

Secondly — But, admitting that the allegations of an equitable defense can be treated as forming part of a strictly common law pleading, those of paragraph II of this answer failed to go far enough to subserve the exigencies of Paine's case. That case required something showing, not merely the equitable title, but the legal title, to the lands, to have been in himself, when the logs

were cut. The allegations of paragraph II failed to go that far. They undoubtedly showed equitable ownership in Paine, by virtue of the contract of purchase and the payment of the price in preferred stock.

To have constituted him owner of the legal title as well, it would have been requisite that a deed of conveyance, running to him, should have been made out and delivered. But paragraph II does not show any delivery of such a deed. It does say, that the company made out a deed, and placed the same in the hands of its own servant, to-wit: Land Commissioner Power, for delivery: but there is no allegation, whatever, to the effect that such a delivery was ever actually made. For all that appears from the allegations of paragraph II, such deed remains undelivered, and in the company's own possession, to this date.

Power having been the servant of the railroad company, his possession of the deed was, of course, the possession of the company itself. Consequently, the placing of the deed in his hands for the purpose of delivery was merely the changing of the manner of its own custody thereof.

If paragraph II had gone further and alleged, not only that the deed had been placed in Power's hands for delivery, but that Power had actually delivered the same, then it might be contended that a legal title to the lands, in Paine, had been sufficiently stated by that paragraph.

II.

THE TRIAL COURT SHOULD HAVE SUBMITTED TO THE JURY THE QUESTION WHETHER THE LOGS IN CONTROVERSY HAD BEEN CUT WITH PAINE'S ASSENT, EXPRESSED OR IM-

PLIED, WITH THE INSTRUCTION THAT, IF THEIR FINDING UPON THIS ISSUE SHOULD BE IN THE AFFIRMATIVE, THEIR VERDICT SHOULD BE FOR THE DEFENDANT.

Upon the trial, H. Brandenburg, an agent of the Knife Falls Lumber Company, and a witness for the defendant, testified, in substance, that in the fall of the year 1879, or in the winter of the years 1879 and 1880, James B. Power, then land commissioner of the Northern Pacific Railroad Company, gave to the Knife Falls Lumber Company a verbal license to cut logs upon the tract of land mentioned in the complaint in this suit; that, in pursuance of that license, the logs in controversy were cut by the lumber company; and that the latter never had any notice of the revocation of such license.

Brandenburg further testified as follows:

"I met the plaintiff, Mark Paine, on the train between "Duluth and Northern Pacific Junction, after the cutting "of the logs, and some time in the month of April, 1881. "We had a conversation about the cutting of the logs in "controversy. I said to him, that we had cut the logs "under a permit from the company, and that he knew we "were doing so, while we were cutting, and that he should "have let us know in case he had objection to our doing "it. He said it was our business to know on whose land "we were cutting. Also that it didn't make any differ- "ence to him if we had a mind to cut logs for him. He "also said that one McLanson had told him about our "cutting. When I told him that we were cutting under "a permit from the company, and that he knew it, he "didn't dispute me."

See Printed Record, pp. 21, 22.

Based upon this evidence, the railroad company prayed the following instruction to the jury:

"If the jury believe that the Northern Pacific Railroad "Company gave a license to the Knife Falls Lumber Com-

"pany to cut logs upon the lands described in the com-
"plaint, while the said railroad company was owner of
"the said lands, and that the said lumber company cut
"the logs described in the complaint acting under such
"license, and that the plaintiff knew of the existence of
"such license and knew that said lumber company was
"cutting such logs under the said license, and made no
"objection to such cutting, in such case the jury would be
"at liberty to find the said cutting was with the license
"and permission of the plaintiff; and if the jury does so
"find it should find a verdict for the defendant."

The court refused to so instruct the jury; but did instruct it, that the only issue under the pleadings in the case, to be tried by the jury, was the value of the logs mentioned in the complaint, at the time and place when the same were taken possession of by the defendant; and also that there was no evidence in the case tending to show that the logs in controversy were cut with the license of the plaintiff.

See Printed Record, p. 22.

The evidence of Brandenburg showed an attempt on the part of Paine, not merely to avail himself of a strict legal right working a hardship to the lumber company, but even to perpetrate a gross fraud on that concern. For the purpose of considering the questions raised on this bill of exceptions, the statements of Brandenburg must be assumed to have been in accordance with the facts. True, some portions thereof were contradicted by Paine himself. But such contradiction merely raised a question of veracity; of which the jury had exclusive cognizance. The jury would have been at perfect liberty to accept Brandenburg's statement as truthful in every particular, and to reject the denials of Paine as utter falsehoods. It may be safely assumed that the jury would have taken

precisely that course had an opportunity of considering the defendant's case upon the evidence been afforded it.

The error into which the court below fell, in withholding the issue of license from the jury, consisted in separating from a chain of circumstances one single fact, to-wit, the sale of the lands to Paine, and refusing to accord any legal consequence whatever to the remainder.

This is abundantly shown by its opinion rendered upon the decision of the motion for a new trial. The court suffered itself to see only, that, after the license to the lumber company, Paine bought the lands from the railroad company: and closed its eyes to the undisputed fact, that, of such sale the lumber company had no notice, as well as to the other facts which the jury were authorized to infer from Brandenburg's testimony.

It is undoubtedly true that, where there are no other circumstances to control, a license to enter upon the lands of another is to be deemed revoked by an unconditional sale and conveyance of such lands. But the power of revoking an outstanding license, in such a way, can not be used by the grantee as an instrumentality of deliberately robbing a licensee of the fruits of labor, ignorantly and innocently put upon the property subsequently to the transfer. A long line of very respectable authorities holds it even beyond the power of a licensor, or his successors in interest, to revoke a license by any mode, when such revocation would thereby enable the latter to appropriate, without compensation, betterments of the licensee.

See Swartz *vs.* Swartz, 4 Penn. St. 356.

Rerick *vs.* Kern, 14 S. and R. 267.

Lacy *vs.* Arnett, 33 Penn. St. 169.

Cumberland R. R. Co. *vs.* McLanahan, 59 Penn. St. 23.

Huff *vs.* McCauley, 53 Penn. St. 206.

Sheffield *vs.* Collier, 3 Kelly, 82.

Cook *vs.* Pridgen, 45 Geo. 331.

Snowden *vs.* Wilas, 19 Ind. 10.

Lane *vs.* Miller, 27 Ind. 534.

Wilson *vs.* Chalfant, 15 Ohio, 248.

Ricker *vs.* Kelly, 1 Me. 117.

Russell *vs.* Hubbard, 59 Ill. 335.

If Brandenburg's evidence be credible, and it must be so regarded for the purposes of this writ of error, Paine admitted to him, in part by words, and in part by silence when he ought to have spoken, that he knew the lumber company to be cutting the logs under a permit from the railroad company, and in ignorance of his purchase of the land.

It is obvious that, by the felling of the trees and the manufacture of the same into logs, the lumber company added to the property labor much more valuable than the standing timber itself.

If Paine, knowing that the logs were being cut and manufactured by the lumber company, relying upon its permit, and in ignorance of his interest in the property, stood by in silence, and let the process go on until completed, the subsequent successful assertion of a complete title to the logs would enable him to appropriate the value added to the timber by the lumber company, without any compensation whatever. It can not be that the law permits the doing of a thing which every right mind must characterize as nothing less than grossly fraudulent.

Paine's silence, under such circumstances, and with such knowledge, can only be construed as the recognition, on his part, of the continued existence of the permit.

Of course, to constitute license or permission on the part of Paine, for the cutting of the logs, no affirmative act of his was necessary. Mere silence, in a case like this, would manifestly operate as consent.

Had Paine desired to treat the permit as revoked by the transfer to himself, it became his duty, when he saw the lumber company still acting under the same, and expending money and labor in so doing, to express his dissent therefrom: and, in some way, to convey to that concern notice of his intention to consider the permit revoked.

It can not be sound law, that anything can amount to a revocation of a license, so as to make the licensee a trespasser, which does not give him notice of the revocation. Sound reason and good policy require that licenses, which are so common in many branches of industry, should not be capable of conversion into mere traps with which to catch the money and labor of others.

It did not appear in this case that the lumber company was guilty of any negligence whatever. None was even imputed to them. The cutting followed the permit only by a few months, or by a year at the outside. That concern had a right to rely upon notice of revocation, if any should occur. It certainly would be unreasonable that action under a license, which had been revoked without notice to the licensee, should be treated as a trespass punishable by such heavy penalties as are here sought to be inflicted, even when all the parties are

personal property. Much hardship has been, and is daily being, occasioned thereby. The law is never more positive upon any subject than that it is the duty of one who buys chattels to inform himself of the right of the seller to dispose of them. Yet, the rule of *caveat emptor* is not, at the present day, any better settled than that other rule, to-wit: that if the owner of property, by his conduct, encourage another to purchase from one having no title, the law will treat the transactions as a valid sale. The law must take a similar course where the owner of property, seeing another enter upon it and adding value thereto in good faith, relying upon a license of the revocation of which he has never been notified, stands by in silence, and lets the process go on, and then, after its conclusion, pounces upon and seeks to appropriate, without reward, the fruits of the other's industry and expenditure.

The judgment should be reversed, and a new trial awarded.

W. P. CLOUGH,

Of Counsel for Plaintiff in Error.

PAINE VS. NORTHERN PACIFIC RAILROAD COMPANY.

(*Circuit Court, District of Minnesota. December Term*, 1882.)

Motion for new trial.

Ensign & Cash and Wilson & Lawrence, for plaintiff.

W. P. Clough, for defendant.

NELSON, D. J. (orally)—A bill of exceptions was settled and signed for the purpose of allowing a writ of error to the supreme court of the United States. A motion is made by the defendant, the Northern Pacific Railroad Company, for a new trial. Suit was brought by Paine against the Northern Pacific Railroad Company to recover the value of a large amount of timber that was cut upon land owned by plaintiff, and sold to him by the Northern Pacific Railroad Company.

The principal defense set up by the Northern Pacific Railroad Company is that, before they sold to Paine, a parol license was given to the Knife Falls Water Power Company to cut upon this specific property, the latter agreeing to cut timber to a certain amount, and deliver to the former at a certain price. The Knife Falls Water Power Company went upon this land and cut the timber. Subsequent to this parol license the land was sold unconditionally to Paine. There is no question but that the timber was cut upon Paine's land after he purchased the property unconditionally. The defense is, that this parol license, previously given to the Knife Falls Water Power Company, was never revoked, and, that being so, it was a defense in this suit of Paine against the railroad company to recover the value of the timber.

I held, on the trial, that such parol license was no defense to this action.

A writ of error will be allowed, and the case may go to the supreme court upon the bill of exceptions, as settled and signed.

119-521

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JAMES. H. McKENNEY,
CLERK.

SUPREME COURT
OF THE
UNITED STATES
OCTOBER TERM, 1886.

No. 90.

NORTHERN PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

v.

MARK PAINE,
Defendant in Error.

In Error to the Circuit Court of the United States for the District of Minnesota.

EUGENE M. WILSON,
Of Counsel for Defendant in Error.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1886.

THE NORTHERN PACIFIC RAILROAD COMPANY,

Plaintiff in Error,

vs.

MARK PAINE.

POINTS AND AUTHORITIES FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

The defendant in error, Paine, who was plaintiff in the court below, brought his action in a state court of Minnesota, against the plaintiff in error, the Northern Pacific Railroad Company, to recover the value of certain pine logs of Paine, alleged to have been wrongfully taken and converted by said railroad company.

The issues were made in the state court by the complaint, page 4 of transcript; the answer, page 13, and the reply, page 5.

The answer sets up three defences:—

First—The general issue.

Second—That the logs in question were cut from certain described lands to which the railroad company had acquired title from the United States, and which it had sold and conveyed for a valuable consideration to Paine. But it was also alleged that said contract and conveyance were obtained through fraud.

Third—That the said logs so cut on the said lands were cut under a license from said Paine to the Knife Falls Lumber Company, and bought by the railroad company of said licensee, and possession thereof taken.

The reply affirms the legal title as alleged, but denies the fraud and the license.

After the issues were formed, the case was removed to the United States Circuit Court, and there tried.

The plaintiff below on trial introduced no proof of title, relying upon the admissions of the answer. He proved the cutting of the logs after his acquisition of title to the lands, the value of the same, and disproved the alleged license, and received a verdict accordingly.

I.

The only question before this court is one of practice and pleading.

The plaintiff in error claims that the defenses being distinct, the allegations and admissions in each go no farther than that particular defense; that the first defense having pleaded the general issue as to title and taking, that these must be proven, although legal title and the taking are admitted and alleged in the second and third defenses.

The defendant in error contends: That in the United States Circuit Court of the District of Minnesota, admissions in pleading are to be taken against the pleader upon all issues in the case, irrespective of what cause of action or defense such admissions may be made in. That one defense is modified by another, with which it would be inconsistent without such modification.

The United States Circuit Court for the District of Minnesota has adopted, by Rule VI, the practice of the state in actions at law. The rule is as follows: "In "actions at law the practice and pleading as they existed "under and were prescribed by the general statutes of "the State of Minnesota, which took effect and went into "operation on and after the 31st day of July, 1866, in "and for the district court of said state, be and the same "are hereby adopted in this court, except so far as the "same may be contrary to the constitution and laws of "the United States."

The statutes in Minnesota relating to this subject have remained the same since adoption of that rule.

The practice of the State of Minnesota, ever since it has been a State, is as stated and claimed for defendant in error.

Derby & Day vs. Gallop 5 Minn., 119, was an action in replevin for unlawfully taking the plaintiff's goods. The answer first denied each and every allegation of the complaint; second, it justified under a levy upon execution. Held: That the answer admitted the taking for all purposes of the trial, and that the second defence modified and affected the first.

The same doctrine is laid down in *Bergfield vs. Mc Clung, 4th Minn., 148*.

In *Scott vs. King, 7th Minn., 494*, it is held that a general denial in one defence, inconsistent with special matter alleged in a second defence, is to be considered as modified thereby.

In *Zimmerman vs. Lamb, 7th Minn., 421*, it was held: that in an action for conversion, the defendant will not be allowed to maintain a justification and also a denial of plaintiff's possession.

See also *Livingston vs. Brown, 18th Minn., 308*.

In *St. Anthony Falls Water Power Co. vs. King's Bridge Company, 23d Minn., 186*, the plaintiff alleges its corporate capacity. Defendant, in answer, denied each and every allegation of the complaint, and in a second defence alleged certain acts of the plaintiff without alleging them as done in any other capacity than as

alleged in the complaint. Held: That such allegations qualified the general denial and admitted the corporate capacity.

In *Perkins vs. Morse, 30 Minn., 11*, the plaintiff sued to determine adverse claim of defendants to land. Answer of defendant contained three separate defences. First denies each and every allegation of complaint. and claims ownership. Second alleges ownership by defendant and that plaintiff wrongfully withholds same. Third, that she derives title through one Chas. Galpin, a former owner, and the same person who was grantee of plaintiff, but by a subsequent deed.

On trial it was held that the second defence admitted the possession of plaintiff, and that defendant having failed to show title from Chas. Galpin, her third defence admitted the title of plaintiff; that these admissions were for all the purposes of the trial, and stood as affecting the general issue in the first defence.

II.

The admissions relied upon by defendant in error as admitting his title to property in question are as follows: in folio 39—"that defendant had acquired, under and in pursuance of acts of Congress relating to defendant, and by reason of construction of portions of defendant's line of railroad, authorized by said acts to be built, large quantities of land situated in Minnesota and elsewhere."

In folio 34—"that during all the period Power and Kindred were so engaged in the service of defendant, their duties were to negotiate sales of said lands of defendant, and in defendant's name and behalf to enter in contracts for sale, etc."

In folios 37 and 38: "That Power and Kindred—fraudulently conspired with the plaintiff Paine, and did with the assistance of Paine actually deprive defendant of the benefits which it ought to and otherwise would have derived from the ownership and sale of a large quantity of its said lands, and thereby wrongfully and fraudulently obtained legal titles to a large quantity of such lands—that is to say—that said Power pretending to act

for defendant, made out and signed—an instrument in writing which was dated Oct. 9th, 1886, and which was the form in general use in defendant's land department for sale of its lands, and which purported on its face to be a contract between the plaintiff Mark Paine and the defendant for the sale and conveyance by defendant to said Paine of all the following described lands, etc.," —all of which lands were lands of defendant obtained by it under acts of Congress in the manner aforesaid.

In folios 40 and 41—"At or about time of making and signing said contract, said Power and Kindred and plaintiff or some of them—obtained shares of stock of defendant equal in face value to the sum named in said pretended contract as the price to be paid defendant for such lands, and said Power tendered the same to defendant as having been paid him on said contract. That defendant being ignorant of the purposes of Power, Kindred and plaintiff, etc.—accepted said shares of preferred stock, and executed and placed in the hands of the said Power for delivery to the plaintiff herein, a deed of all of said lands to said Paine as grantee."

In folios 42 and 44: "That defendant is willing to restore plaintiff, etc., the actual cost of said preferred stock, etc., upon release and reconveyance of said lands to defendant, the logs described in the complaint were all cut upon said lands, and plaintiff has no title to the same land as resulting from said fraudulent purchase of said lands themselves."

These admissions therefore admit the legal title in the plaintiff of the lands from which the logs were cut, and only to be defeated by showing such fraud connected with obtaining the title as would defeat it.

It does not alter the effect of these admissions, that the defence of fraud which could have been tried in the State Court in connection with other defences, had to be heard in the Federal Court upon the equitable side. This defence was not withdrawn, but allowed to stand to save the necessity of evidence upon points where there was no actual dispute.

The defendant did not attempt to have the trial of

Abbott vs. C. M. & St. P. R. R. Co., 30 Minn. 484.
Dawson vs. Holmes, 30 Minn. 107.
3rd Wait's Pr. 184.

For these reasons it is submitted that the judgment should be affirmed.

EUGENE M. WILSON,
Counsel for Defendant in Error.

119-561

Supreme Court of the United States.

OCTOBER TERM, 1886.

No. 90.

THE NORTHERN PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

MARK PAINE.

In Error to the Circuit Court of the United States for the District of Minnesota.

BRIEF FOR THE DEFENDANT IN ERROR.

M. F. MORRIS,
Of Counsel for Defendant in Error.

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and had, in fact, been sold and conveyed to him by the company itself (about October, 1880), yet the purchase by Paine was the result of a fraudulent combination between him and one Power, who was at the time the "land commissioner" of the railroad company, the fraud consisting in the concealment from the company by Paine and Power of the character and value of the lands, on account of which alleged fraud the company had, in or after April, 1881, filed its bill in equity to cancel the sale and to compel a reconveyance by Paine, which bill was then pending.

3d. A plea that the cutting of the logs had been done by the Knife Falls Lumber Company, a body corporate in Minnesota, with the license of the plaintiff Paine, and that the lumber company subsequently sold and delivered the logs to the railroad company.

To these answers or pleas there was a replication by the plaintiff Paine—1st, denying the alleged fraud and fraudulent combination set up in the second plea; and, 2d, denying that he (Paine) had given any assent or license to the cutting of the logs by the lumber company, and averring that when the railroad company bought the logs from the lumber company it knew that they had been wrongfully taken from the plaintiff's lands.

Subsequently the plaintiff filed a supplemental replication in the nature of a plea *puis darein continuance* to the effect that the suit in equity referred to by the defendant company in its second plea or answer had been decided in favor of him (Paine), and the railroad company's bill had been dismissed; but this replication the plaintiff withdrew to prevent a continuance which otherwise would have been granted.

(Record, p. 19).

At the trial the plaintiff proved the value of the logs and the time of the taking, and rested.

The defendant thereupon asked for an instruction to the jury to return a verdict for the defendant, which was refused. This refusal constitutes the first assignment of error.

This refusal was right. The exception to it is based upon the theory that the plaintiff had not proved his legal ownership of the lands from which the logs had been taken. The taking and conversion are conceded, but the plaintiff's ownership is denied. The court below held that the railroad company had admitted the plaintiff's ownership of the lands in its second plea or answer.

It is now agreed, on behalf of the company, that the second plea or answer, from which the admission of ownership is deduced, was merely an *equitable defense*, which could not be tried, and was not tried, in the Federal court; and, 2d, that, if this plea or answer is admissible in evidence to show an admission of plaintiff's ownership, the ownership manifested by it is only an equitable ownership, arising from the contract of sale and the payment of the purchase-money; that it does not show the delivery of the deed; and that, therefore, Paine's title was not sufficient to maintain an action of trover.

Both of these positions are untenable. The company's second plea is not merely an equitable defense. Its gravamen is fraud; and fraud is cognizable as well at common law as in equity.

But even if it were only an equitable defense, an admission manifested by a pleading in equity can be given in evidence as an admission in a suit at common law. An admis-

sion, however or wherever made, is still an admission. This would seem to require no argument to support it.

See 5 Minnesota. 119.

7 Minnesota. 421, 494.

If it be suggested that the admission is a qualified or conditional one—qualified by the allegation of fraud—and that the condition must be taken into consideration with the admission, there is nothing in the suggestion. The answer is nothing more than a common-law plea of confession and avoidance, which has always and uniformly been held to admit the plaintiff's case and to place on the defendant the burden of proving the matter in avoidance.

But, further, the qualification of fraud is an absolute nullity upon its face. The alleged fraud consists solely and exclusively in the alleged concealment by Paine and Power from the company of the true value and character of the lands which the company had placed upon the market for sale, and which Paine contracted to purchase. Assuredly this is not fraud, either at law or in equity. It would be a singular rule that would require a purchaser, under penalty of being charged with fraud, to go and protest against the low estimate which a vendor placed upon his land.

But it is next argued that the admission is only of an equitable title in Paine. What of it? Certainly the equitable owner of land, who is in possession of it, can maintain a suit in trover for personal property taken from the land, and he is not required to prove his legal title, as in ejectment.

In fact, however, the defendant's second plea or answer does admit in terms and by necessary implication that the

plaintiff Paine held the *legal* title to the lands in question, as is very clear from a perusal of it. The whole theory of that plea is that the *equitable* title is in the company and not in Paine, and that the latter holds merely a barren legal title.

The first assignment of error is, therefore, clearly untenable.

2.

The second assignment of error turns upon the question of license.

The court below was asked by the railway company to instruct the jury that if they found from the evidence that the railroad company had given the lumber company a license, while the former was owner of the lands, to cut logs upon the lands, and that the plaintiff knew of the existence of such license, and that the lumber company was acting under it, and that the plaintiff made no objections to such cutting, the jury would be at liberty to find that such cutting was with the license of the plaintiff, and their verdict should be for the defendant.

This instruction is not good law under any conceivable condition of things. It is fatally erroneous in many particulars.

In the first place, it does not follow that even if the circumstances stated amounted to a license on the part of Paine, the verdict of the jury should be for the defendant. Counsel for the defendant in his brief seems to forget two very important facts that are plain in the record—1st, that this is not a suit against the lumber company but against the railroad company; and, 2d, that it is not a suit for *cut-*

ting the logs, which for all the purposes of the present case might be conceded to have been lawful, but a suit for the *taking and conversion* of the logs after they had been cut. The suit being one against the railroad company for conversion of the cut logs, it is of no consequence whatever whether the lumber company had a right to cut them or not, or had any license or permission from Paine; so that, even if the first part of this instruction asked for were correct, the request that the verdict should be for the defendant renders it fatally erroneous.

In the second place, the instruction is erroneous, because as matter of law the circumstances enumerated do not, and cannot, constitute a license from the plaintiff Paine. A license requires consent or assent. Knowledge does not constitute, or in any manner imply, consent. There is no obligation, either legal or equitable, upon any man to warn another against an intended trespass; and the whole proof upon the point in this case for the railroad company is that the plaintiff Paine, knowing that the lumber company was cutting under a license from the railroad company, *did not object to it.* Only this, and nothing more. How could a license be inferred from such proof as that?

The brief for the railroad company dwells at length upon the assumed hardships to the lumber company in not having been warned by Paine from cutting his timber, and it reasons as though the circumstances constituted an equitable estoppel, and as though an equitable estoppel constituted a good defense in a suit at law. An equitable estoppel is not a good defense at common law; the circumstances here do not constitute even the semblance of an estoppel, and we are not suing the lumber company for its cutting, but

the railroad company for its appropriation of the cut logs. So much for the hardship.

On the other side, let it be remembered that the beneficiary of this appropriation was the railroad company, which had conveyed the lands to Paine, and whose duty it was, if it was the duty of any one, to have notified the lumber company not to proceed under the previous license. The license of the railroad company, it is conceded, as matter of law, was revoked by the conveyance of the lands by the railroad company to Paine, and, unless the knowledge of Paine revived it, it had no longer any existence.

It is said that the lumber company had no notice of the sale by the railroad company to Paine; but there is no proof whatever upon that point, and we say again that we are *not* suing the lumber company. That is sufficient answer to this grievance.

There is no act or deed of any kind whatever done by Paine in this connection that amounts to a license to cut the timber on his land or that amounts to an assent to the license previously granted, it is said, by the railroad company. There is not one single fact shown, but only his knowledge; and knowledge, we repeat, does not constitute consent or assent.

Again, this instruction implies that the railroad company had given the lumber company license to cut timber on these lands. There is no proof whatever of any such concession. There is proof that one James B. Power, who was at the time land commissioner of the railroad company, had given a verbal license to the lumber company; but it does not appear that he did it on behalf of the railroad company or that he had any authority to do so.